

## Three-dimensional Conflict of Laws in Europe

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## **Three-dimensional Conflict of Laws in Europe**

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## **Abstract**

The EU is a structure which is positioned “in-between” hierarchically organized nation-state governing structures and heterarchically structured global governance structures. Thus, the EU is a hybrid which partly relies on governing and partly on governance. This two-dimensionality is the central reason why the question of the constitutional character of the EU remains fundamentally unresolved. Thus, it is proposed that the EU should aim for the development of a constitutional form aimed at alleviating the tensions inherent in the European construction through a conflict of laws approach. In order to respect the hybridity of the Union, such an approach will however have to be based on a three-dimensional conflict of laws concept insofar as it would have to take account of horizontal conflicts between territorial units, vertical conflicts between the EU and its member states as well as horizontal conflicts between the functionally differentiated structures of the wider society.



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## 1. Introduction

The European Union (EU)<sup>1</sup> operates “in-between” its member states (MS) and global trans-national structures.<sup>2</sup> Thus, the EU’s legal order is neither characterized by hierarchy in the nation-state sense nor is it characterized by the kind of radical heterarchy which is a key feature of global legal structures.<sup>3</sup> Rather the EU is a hybrid which combines hierarchy and heterarchy in a particular manner. This hybridity is also apparent in the organizational form of the EU. The EU is an organizational conglomerate which consists of an entire range of institutional structures. From an overall perspective, the EU can nonetheless be understood as resting on a two-dimensional organizational structure in the sense that it, on the one hand, contains a hierarchical governing dimension, consisting of the triangular relationship between the Council of the European Union (the Council), the Commission of the European Communities (the Commission) and the European Parliament (EP) and a heterarchical dimension consisting of a multitude of governance structures (GS), such as the Open Method of Co-ordination (OMC)<sup>4</sup>, Comitology<sup>5</sup> and (regulatory) agencies.<sup>6</sup>

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- 1 Unless otherwise indicated the term ‘European Union’ (EU) refers to the EU as well as its predecessors in the form of the European Communities (EC), the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and Euratom.
  - 2 For further elaboration on the EU’s relations to the “wider world“ see; Poul F. Kjaer: The Societal Function of European Integration in the Context of World Society’, *Soziale Systeme. Zeitschrift für Soziologische Theorie*, pp. 367-378, Vol. 13, Heft 1 + 2, 2007.
  - 3 For the heterarchy of global law see Andreas Fischer-Lescano/Gunther Teubner: Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, 999-1046; Andreas Fischer-Lescano/Gunther Teubner: *Regime-Kollisionen: Zur Fragmentierung des Weltrechts* (Suhrkamp, Frankfurt 2006).
  - 4 The OMC was officially launched in 2000 within the realm of the so-called Lisbon process as a mode aimed at ensuring systematic mutual observation between MS through benchmarking and systematic comparisons. De facto this “new” mode is however to a large extent only formalising already existing informal structures of mutual observation, which has existed since the beginning of the integration process. See also Poul F. Kjaer: Formalization or De-Formalization through Governance? in: Rainer Nickel (Ed.): *Conflict of Laws or Laws of Conflict*. ARENA Report Series, Oslo, 2009 (forthcoming). For an overview of the different forms of OMC processes see Susana Borrás/Kerstin Jacobsson: ‘The open method of co-ordination and new governance patterns in the EU’, pp. 185-208, *Journal of European Public Policy*, 11, 2, 2004, p. 193-94.
  - 5 Comitology dates back to the beginning of the 1960s. In a narrow sense comitology committees only deal with the implementation of Community legislation. Different



The first dimension constitutes the political system of the EU. The latter dimension, on the other hand, represents forms through which the political system of the EU ensures its embeddedness in its environment.<sup>7</sup> This dimension therefore reflects the functionally differentiated basic structures (*Tiefenstrukturen*) of the wider society just as it is directly aimed at overcoming the distinction between the public and the private spheres of society.<sup>8</sup> Accordingly, it can be argued that the distinction between governing and governance constitutes the central distinction (*Leitdifferenz*) on which the EU is founded, in the sense that this distinction represents a functional equivalent of the “old-European” (*alteuropäische*) state/society distinction originally introduced by Hegel.

The question how to describe the EU’s constitutional form must therefore be transformed into the question of how the relationship between the governing and the governance dimensions, as well as how the relations between the different forms of GS is being constitutionalized? The argument presented here is that this question can only be answered through the development of a third category of constitutionalism which extends beyond traditional nation-state constitutionalism whilst taking into consideration the differences between the

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committees exist for the preparation and negotiation of legislation. Hence, the exact number of comitology committees remains disputed. Estimations differ from 300 to around 1000 committees depending on the criteria’s used. The committees consist of Commission officials, MS officials and – to a lesser extent – private actors. For an overview see Georg Haibach: ‘The History of Comitology’, pp. 185-215 in: M. Andenas/A.Türk (Eds.): *Delegated Legislation and the Role of Committees in the EC* (The Hague, Kluwer, 2000).

- 6 The first two agencies were established in the 1970s. From the mid 1990s the number of agencies has however expanded rapidly. Currently 32 agencies exist and several more has been planned. Although the agencies in an organizational sense have a hierarchical nucleus, a common feature is however that they mainly serve as coordinators and secretariats of heterarchical networks which are occupied with the gathering, processing and re-dissemination of information. For an overview see Poul F. Kjaer: *Between Governing and Governance. On the Emergence, Function and Form of Europe’s Post-national Constellation*, European University Institute (2008), available at <http://hdl.handle.net/1814/9067>, p. 96.
- 7 To the three main forms of governance structures mentioned above one could also add mutual recognition, the partnership concept, originally developed within the context of Community structural funding, the so-called social dialogue as developed under the framework of the Maastricht Treaty, and the concept of Environmental Policy Integration. See Joanne Scott/David M. Trubek: ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, *European Law Journal*, pp. 1-18, 8, 1, 2002.
- 8 Poul F. Kjaer: Embeddedness through Networks – a Critical appraisal of the Network Concept in the *Oeuvre* of Karl-Heinz Ladeur, *German Law Journal* (forthcoming, 2009).

EU and the kind of radically functionally differentiated and heterarchical global structures described by Fischer-Lescano and Teubner.<sup>9</sup> Accordingly, it is suggested that a coherent concept for the description of how legal conflicts in the European context are being stabilized should be based on a three-dimensional concept of conflict of laws capable of describing horizontal conflicts between territorially delineated entities in the form of states, vertical conflicts between the EU and its MS, as well as horizontal conflicts between the functionally differentiated basic structures of the wider society. In relation to the latter dimension, which is concerned specifically with GS, it is moreover suggested that a constitutional principle of functional separation, more extensive than the classical concept of a functional separation of powers, could provide a basis for legal stabilization of norm production.

## 2. The Transformation of Constitutionalism

Although the MS provide substantial limitations to its level of self-determination, the EU must be understood as an autonomous social structure which possesses the freedom to select between various possible operations. The autonomy is also expressed in the understanding that the EU's legal order is converging with the legal orders of the MS but nonetheless remains a separate and independent legal order.<sup>10</sup> The autonomy implies that the EU needs to justify its selections.<sup>11</sup> Firstly, this is the case because all autonomous social structures are faced with a continual demand to ensure their own coherency through the reproduction of narratives that connect their selection of specific operations with their overall structure. But in addition, autonomous social structures are reflexive to the extent that they are conscious that they fulfill specific functions towards society as a whole, as well as towards other partial social structures.<sup>12</sup> Hence, they are continuously faced with the demand to

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9 Andreas Fischer-Lescano/Gunther Teubner: Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 2004, 999-1046; Andreas Fischer-Lescano/Gunther Teubner: *Regime-Kollisionen: Zur Fragmentierung des Weltrechts* (Suhrkamp, Frankfurt 2006).

10 Marc Amstutz: 'In Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning', *European Law Journal*, pp. 766-84, 12, 6, 2006.

11 Jürgen Neyer: The justice Deficit of the EU and other International Organisations, pp. 199-222 in: C. Joerges/P. F. Kjaer: *Transnational Standards of Social Protection. Contrasting European and International Governance*, ARENA Report, No. 5, 2008, Oslo (available at [www.reconproject.eu](http://www.reconproject.eu)).

12 Kai-Uwe Hellmann: Gemeinwohl und Systemvertrauen. Vorschläge zur Modernisierung alteuropäische Begriffe, pp. 77-110 in: H. Münkler/K. Fischer (Hrsg.): *Gemein-*

substantiate their operations towards their environments.

Such justifications are however paradoxical in nature, as they always are *self*-justifications. They are internal operations which are based on the structure's own understanding of the expectations emerging within their environments. A common feature of social structures, including a hybrid such as the EU, is therefore that they develop strategies intended to "cover up" the paradoxical nature of such justifications. They construct semantic artifacts internally which they can claim are external in nature. The religious system refers to a concept of God, the economic system to the market, the (democratic) political system to the people and the legal system to systems of (natural) rights. Hence, these systems can claim that their operations merely reflect the will of God, market demand, the will of the people or self-evident universal rights. These metaphors are assigned a foundational quality, but they also serve as mirrors which the respective functional systems use in order to scrutinize themselves, thereby potentially increasing their level of reflexivity. Hence, these concepts provide the functional systems in question with the possibility of internally evaluating and substantiating their operations.

Within the political system, such practices are also described by the concept of legitimacy. As indicated, democratic political systems derive their claim for legitimacy through reference to the will of the people, who the rulers claim to represent. But in addition, the political system has engaged in a specific strategy of reflexive "self-binding" through a carefully developed "partnership" with the legal system. This strategy falls under the name constitutionalization. In a narrow sense, constitutions serve as structural couplings between the legal and the political systems, thereby allowing the former to rely on legislation enacted in the political system as a basis for its rights-based jurisprudence.<sup>13</sup> In the same way, the political system accepts limitations to its autonomy through a legal framing of its activities. The legal framing diminishes the contingent character of political operations, thereby serving as a tool which facilitates a stabilization of the expectations arising in the environment vis-à-vis the political system. This is vital since the continued functioning of social structures is conditioned by generally stable expectations concerning the environment within which they operate. It is exactly this kind of stability which the "rule of law" ensures for the political system (as well as for other social systems) since the central function of law is the stabilization of normative expectations. The

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*wohl und Gemeinsinn. Rhetoriken und Perspektiven sozial-moralischer Orientierung* (Berlin, Akademie Verlag, 2002), pp. 99.

13 Niklas Luhmann: Verfassung als evolutionäre Errungenschaft, 176-220 in: *Rechtshistorisches Journal*. 9, 1990.

political system can therefore claim legitimacy by referring to the legal framing of its operations as this, in principle, guarantees that its impact on the remaining parts of society is reflected in the selection of its operations.

As previously indicated, constitutionalism was largely oriented towards the relationship between law and politics in the era of classical modernity.<sup>14</sup> The radicalization of modernity in the latter half of the 20<sup>th</sup> century has however placed the nation states, and thereby the nation-state model of constitutionalism, under increased pressure. As a consequence, it is possible to observe two interrelated developments: Firstly, a move towards societal constitutionalism, in that the legal system increasingly engages in couplings that possess a constitutional quality, with social structures falling outside the realm of the political system.<sup>15</sup> Secondly, within the emerging post-modern paradigm of trans-national law, it is argued that new types of law (such as Lex Mercatoria and Lex Digitalis) have emerged and that these forms of law operate within a context of “extreme self-reference”. This arises because the functional synthesis (*Funktionssynthese*) between the legal and political systems, which was made possible in the nation-state realm through structural couplings between the legal and the political systems via constitutions and legislative acts, is not or at least only partially in place, at the trans-national level. Hence, trans-national law is not capable of relying on legislation enacted by the political system to provide external reference points for its jurisprudence. Instead trans-national law is forced to rely on itself to a degree which is even more radical than has traditionally been the case at the nation-state level.<sup>16</sup> In contrast to classical international law, new forms of trans-national law therefore, increasingly rely on self-defined principles.<sup>17</sup> Global and regional political-administrative GS are

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14 As illustrated by Reinhart Koselleck the limitation of constitutions to the relationship between law and politics is however a specifically modern phenomenon. In the Middle Ages constitutions occurred in multiple forms. See Reinhart Koselleck: ‘Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung’, pp. 365-82 in R. Koselleck: *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und Sozialen Sprache* (Frankfurt am Main, Suhrkamp Verlag, 2006).

15 For different perspectives on societal constitutionalism see David Sciulli: *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (New York, Cambridge University Press, 1992) and Gunther Teubner: ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’, pp. 3-28 in C. Joerges/I.-J. Sand/G. Teubner (Eds.): *Transnational Governance and Constitutionalism* (Oxford, Hart Publishing, 2004).

16 Marc Amstutz/Vaios Karavas: ‘Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum’, *Rechtsgeschichte*, pp. 14-32, 8, 2006.

17 For international and trans-national economic law see Maria Panezi: ‘Sources of Law in Transition. Re-visiting General Principles of International Law’, *Ancilla Iuris* (www.anci.ch), pp. 66-79, 2007.

confronted with a similar situation since they increasingly expand their operations without being subject to a formal legal framing. If law is activated at all, this tends to happen ex-post.<sup>18</sup> Scholars who celebrate the intrinsic link between the rule of law and democracy as a key accomplishment of modernity, have observed this with some concern.<sup>19</sup> Positive interpretations of this development have, on the other hand, emphasized that “hard” legal norms are merely being replaced or complemented by “soft” legal norms, acting as functional equivalents of hard norms, at the trans-national level.<sup>20</sup> Whatever interpretation is chosen, the emergence of a dense net of trans-national structures does however imply a break with, or at least a transformation of, traditional concepts of constitutionalism, since the legal framing of non-nation state political-administrative structures assumes a different form compared to the classical modern forms which emerged in the nation-state context.<sup>21</sup>

### 3. Partial Statehood

When “applying” the above post-modern perspective to the EU, certain “misfits” are however apparent. The EU fulfils Luhmann’s minimalist definition of a state,<sup>22</sup> as it consists of a political and a legal system structurally coupled through a constitutional framework. Hence, although imperfect, a functional synthesis between law and politics can actually be observed in the EU context. In addition, the EU’s political system is capable of relying on a hierarchically organized *Weberian* bureaucratic machinery of considerable magnitude. The EU is moreover, structurally coupled to a territory and has (tentatively) developed a concept of citizenship. Within the governing dimension, it relies on a

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18 Karl-Heinz Ladeur: ‘The Changing Role of the Private in Public Governance – The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation. A Comparative Approach’, *EUI Working Papers Law*, 9 (2002), p. 32.

19 Jürgen Habermas: ‘Die postnationale Konstellation und die Zukunft der Demokratie’, pp. 91-169 in: J. Habermas: *Die postnationale Konstellation. Politische Essays* (Frankfurt am Main, Suhrkamp Verlag, 1998); J. Habermas: *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und demokratischen Rechtsstaats* (Frankfurt am Main, Suhrkamp Verlag, 1992), p. 167.

20 E.g. David M. Trubek/Patrick Cottrell/Mark Nance: ‘Hard Law’ and EU Integration’, pp. 65-94 in: G. de Burca & J. Scott (Eds.): *Law and New Governance in the EU and the US* (Oxford, Hart Publishing, 2006).

21 Neil Walker: ‘Post-Constituent Constitutionalism’, pp. 247-268 in: M. Loughlin and N. Walker (Eds.): *The Paradox of Constitutionalism* (Oxford, Oxford University Press, 2007).

22 Niklas Luhmann: *Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 2000), p. 390 f.

distinction between the public and private spheres of society and has adopted traditional state symbols (flag, hymn etc.). These state-like features are moreover, reinforced by the understanding that the EU must be regarded as an autonomous phenomenon since its political system has developed its own policy programs and, with considerable success, has also been able to ensure implementation of these programs, just as the EU legal system, as already indicated, has established its own legal order and independent sources of authority. If we consider that the 19<sup>th</sup> and 20<sup>th</sup>-century nation states, defined by their monopoly on political and legal authority within a given territory, are anomalies whose reign lasted for only a relatively short time span of social development,<sup>23</sup> it is therefore possible to regard nation states as one possible variant among other forms of state, thereby making it possible to argue that the EU also falls within the state category.<sup>24</sup>

Such a “traditionalist” view does not however, sufficiently emphasize the differences between the EU and the nation states. Only a faint distinction can be made between policy programs and polity structure in EU. Instead, the evolution of the constitutional structure and specific policy programs such as the establishment of the customs union, the common agricultural policy, the internal market and the economic and monetary union have gone hand in hand, in the sense that the launch of all these policy programs implied new treaties altering the EU’s constitutional structure. Moreover, no distinction exists between government and opposition in the EU setting. The EU relies on collective binding decisions but has no means of ensuring compliance through negative sanctions and hence no *Weberian* territorial control exists.<sup>25</sup> Although the distinctions between the political and administrative levels are also blurred at the nation state level,<sup>26</sup> the EU embodies the perfect dissolution of this distinction through its special form of “political administration”.<sup>27</sup> This is not only the case within the

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23 E.g. Neil MacCormick: ‘Beyond the Sovereign State’, *The Modern Law Review*, pp. 1-18, 56, 1, 1993.

24 Rudolf Stichweh: ‘Dimensionen des Weltstaats im System der Weltpolitik’, pp. 25-36 in: M. Albert/R. Stichweh (Hrsg.): *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung* (Wiesbaden, VS Verlag, 2007), 26 ff.

25 The EU does not fulfill Pierre Bourdieu’s revised *Weberian* definition of the state either, as he defines the state as the institution which „successfully claims the monopoly of the legitimate use of physical and *symbolic* violence over a definite territory and over the totality of the corresponding population”; See Pierre Bourdieu: ‘Rethinking the State: Genesis and Structure of the Bureaucratic Field’, *Sociological Theory*, pp. 1-18, 12, 1, 1994, p. 3.

26 Hans D. Jarass: *Politik und Bürokratie als Elemente der Gewaltenteilung* (München, C.H. Beck’sche Verlagsbuchhandlung, 1975), especially pp. 125-37.

27 Andreas Bucker/Sabine Schlacke: ‘Die Entstehung einer politischen Verwaltung

realm of GS, but also within the Commission, where the Commissioners' roles fall between those of politicians and civil servants, just as the personal cabinets of the Commissioners continue to assume a dual political and administrative role.<sup>28</sup> Consequently, the EU has also been characterized as a *Weberian* instrument of rule (*Herrschaftsinstrument*) without a master.<sup>29</sup>

Thus, the EU is a hybrid structure which oscillates between the structure of a state and that of trans-national governance, in the sense that it contains elements of both forms at the same time. It consists of a complex bundle of heterogeneous and partly contradictory juridical, political and administrative processes.<sup>30</sup> This is also reflected in its reliance on the key distinction (*Leitdistinktion*) between governing and governance and its position "in-between" the nation states and the global realm.

#### 4. The Integration Overlay

The heterogeneity of the European conglomerate is countered through the establishment of certain unity insofar as the different processes, although to different degrees, are subordinated to an integrationist logic, which is expressed in the Union's regulatory idea of creating an "ever closer union" and which tends to make integration an objective in itself (*Selbstzweck*).

Subordination to the objective of integration helps explain why the political system in the nation-state form continuously encounter disappointments whenever they attempt to control the operations of the EU. Even when their priorities appear to be fully accepted, as was the case with the United Kingdom

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durch EG-Ausschüsse – Rechtstatsachen und Rechtsentwicklungen', pp. 161-256 in: J. Falke/C. Joerges (Hrsg.): *Das Ausschußwesen der Europäischen Union. Die Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung* (Nomos Verlag, Baden-Baden, 2000).

28 Sonja P. Riekmann: *Die kommissarische Neuordnung Europas. Das Dispositiv der Integration* (Wien, Springer Verlag, 1998). For a historical account of the function of the Commissioners' office see also Otto Hintze: 'Der Commissarius und seine Bedeutung in der allgemeinen Verwaltungsgeschichte. Eine vergleichende Studie', pp. 78-112 in: O. Hintze: *Beamtentum und Bürokratie* (Göttingen, Vandenhoeck & Ruprecht, [1910] 1981).

29 Niklas Luhmann: 'Europa als Problem der Weltgesellschaft', *Berliner Debatte*, pp. 3-7, 2, 1994, p. 6.

30 Inger-Johanne Sand: 'Understanding the European Union/European Economic Area as Systems of Functionally Different Processes', pp. 93-110 in: P. Fitzpatrick & J. H. Bergeron: *Europe's Other: European Law Between Modernity and Postmodernity* (Aldershot, Ashgate Publishing, 1998).

(UK) during the negotiations of the Single European Act (SEA) in the mid 1980s, such political priorities are merely “translated” and they consequently assume a completely different connotation and purpose when transferred from the sphere of the MS to the EU sphere. In the specific case of the SEA, and to the surprise of the UK government, the move towards negative integration through the abolishment of barriers to trade was intrinsically linked to a move towards positive integration through re-regulation at the European level. Hence, the Thatcher government quite clearly shared the naivety of the inter-governmentalist brand of EU researchers in believing that the process could be controlled on the basis of nation-state priorities even though the integration process is guided by a logic which is substantially different compared to the kind of logic guiding MS politics.<sup>31</sup>

In other words, it is possible to observe a deeply-rooted division between the forms of policy making in the EU context compared to the MS contexts. There have been countless attempts to explain that the EU is a “normal” power-based political system.<sup>32</sup> However, power politics is based on the ability to ensure subordination on the basis of a distinction between superiority and inferiority (*Machtüberlegenheit/Machtunterlegenheit*) through the possible deployment of negative sanctions.<sup>33</sup> But the EU does not possess such power and has therefore been compelled to resort to other means than force in order to achieve its objectives.<sup>34</sup> Moreover, in established democracies the traditional distinction between superiority and inferiority has increasingly been replaced with the distinction between government and opposition. As already indicated, this distinction has not materialised at the EU level. As opposed to the political system in its nation-state form, the measure of success within the EU is not therefore related to the government/opposition distinction, but instead, concerns whether integration is progressing or at a standstill.<sup>35</sup>

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31 For an intergovernmentalist view on the emergence of the SEA see; Andrew Movrasik: ‘Negotiating the Single European Act: national interests and conventional statecraft in the European Community’, *International Organization*, pp. 19-56, winter, 1991.

32 E.g. Simon Hix: *The Political System of the European Union* (Basingstoke, Macmillan, 1999).

33 Christian Borch: ‘Systemic Power. Luhmann, Foucault and Analytics of Power’, *Acta Sociologica*, pp. 155-67, 48, 2, 2005; Niklas Luhmann: *Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 2000), pp. 88 and pp. 97; Niklas Luhmann: ‘Theorie der Politischen Opposition’, *Zeitschrift für Politik*, pp. 13-26, 36, 1, 1989.

34 Christian Joerges/Michael Zürn (Eds.): *Law and Governance in Postnational Europe. Compliance Beyond the Nation-State* (Cambridge, Cambridge University Press, 2005).

35 Guy Verhofstadt arrived at similar conclusions in that he compares the integration



Moreover, the key element of power, namely its exercise, necessitates knowledge of who is exercising power, or at least the existence of a *symbolic* structure which one can assume, constitutes the centre of power. The absence of the government/opposition distinction means, however, that there is no clearly identifiable centre of power within the EU. Whether governing (*Regieren*) takes place at all within the EU therefore remains a relevant question<sup>36</sup> since the kind of Schmittian decisionism, which is an inherent part of the self-understanding of the political system in the MS form, does not exist within the EU. Instead, as embodied in the “Monnet Method”, the EU has identified integration as a “technical task”, where traditional power politics is regarded as an obstacle to integration rather than a tool of integration.<sup>37</sup> Indeed, every time the EU has pursued integration within areas which have been conceived of as politically crucial by the MS, and which they have been strong enough to reproduce within their respective national settings, it has encountered a wall of resistance. It is therefore not surprising that the “technical tools” with which integration has been pursued have been legal instruments, which dominated the 1960s and 1970s, market instruments, mainly during the 1980s and early 1990s, and governance instruments from the mid-1990s onwards. In contrast, genuine political acts in the nation-state sense have largely been avoided and when tried have led to disappointment. Obvious examples of such disappointments include the failure of the European Defence Community in the 1950s and the Constitutional Treaty (CT) in the first decade of the new millennium. The transformation of the CT into a mere “technical exercise” through the Lisbon Reform Treaty moreover, represents a classic circumvention strategy. One of the strongest features of the integration process is in fact, the tendency to transform political issues into technical issues in order to allow integration to proceed.<sup>38</sup> For example, the transfer of monetary policy from the national to the European level after Maastricht implied that the majority of the national central banks, which had not been politically independent before the launch of the Maastricht process, gained such independence. Moreover, the independence granted to the European Central Bank, as evidenced by the Treaty of

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process with riding a bike. One needs to keep pedalling in order not to fall off. See Guy Verhofstadt: *Les états-unis d'Europe* (Bruxelles, Luc Pire, 2006).

- 36 Markus Jachtenfuchs/Michèle Knodt (Hrsg.): *Regieren in internationalen Institutionen* (Opladen, Leske + Budrich, 2002).
- 37 E.g. Rainer Schmalz-Bruns: ‘Deliberativer Supranationalismus’, *Zeitschrift für Internationale Beziehungen*, pp. 185-242, 6, 1998.
- 38 Maurizio Bach: *Die Bürokratisierung Europas. Verwaltungseliten, Experten und politische Legitimation in Europa* (Frankfurt am Main, Campus Verlag, 1999).

Maastricht, even exceeds the independence of the German central bank.<sup>39</sup>

Another characteristic of EU politics is that the EU takes an “opportunistic” approach to substantial matters. In the case of the SEA, the fiercest resistance came from the UK government and accordingly its liberalist preferences were incorporated to the extent necessary to overcome UK resistance at the same time as the “hidden” re-regulation agenda was played down. Today, with integration increasingly encroaching on the welfare and labour market regimes of the MS, the strongest resistance seems to be from France. Accordingly the liberalist approach, which emerged in order to overcome UK resistance, is slowly being substituted with a “flexsecurity” approach, seeking to combine the advantages of a free market with the upholding of national welfare systems, that has been specifically invented to overcome French resistance. Viewed from the Brussels perspective, continued integration remained the primary objective in both cases however and the choice of actual policy therefore remains of secondary importance. On the other hand, this does not mean that economic concerns (e.g. efficiency and competitiveness), political concerns (e.g. in terms of influence on and the popularity of specific measures) or ethical concerns (e.g. in relation to risk regulation) does not play a role. It only indicates that such concerns are not primary and that they remain subordinated to the integration imperative. Moreover, such subordination is not necessarily problematic since most problems can be addressed in a multitude of ways, and often in a way which will enable the objective of integration and other objectives to be achieved simultaneously. As pointed out by G. Majone,<sup>40</sup> the primacy of integration does, however, create a structural bias which over time tends to systematically produce sub-optimal outcomes, for example when viewed from an economic perspective.<sup>41</sup>

More concretely, the integration overlay is reproduced through the institutional balance (IB) which serves as the skeleton of the EU’s governing dimension.<sup>42</sup> In the literature, this concept is often considered identical to that of a

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39 Giandomenico Majone: *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth* (Oxford, Oxford University Press, 2005) p. 38-39.

40 Ibid.

41 Not surprisingly the EU has therefore been faced with continued public criticism. An anecdotic but illuminating example of such criticism can be found in a critical comment on an European Commission discussion paper on mortgage credit in the European Union entitled ‘Integration is not necessarily the right concept to guide integration’ where David Miles, the Chief Economist from Morgan Stanley, made the following illuminating statement: ‘The Commission needs to keep in mind that what matters is efficiency, rather than integration as an end in itself’, *Financial Times*, 16 Dec. 2005.

42 In the *Köster* case the European Court of Justice (ECJ) explicitly recognized the concept of IB as a central constitutional feature of the Community. See *Einfuhrstelle v.*

functional separation of powers.<sup>43</sup> This view is however, based on a superficial understanding of the concepts. In the EU, legislative power is divided between the Commission, the Council and the EP; executive power is divided between the Commission, the Council and the MS; and juridical power is divided between the European Court of Justice (ECJ), the Court of First Instance (CFI) and the MS courts. Thus “it simply appears impossible to characterize the several Community institutions as holders of one or the other power since a close analysis of their prerogatives does not indicate a clear-cut line between legislative and the executive branches of the Community government”.<sup>44</sup> Hence, it is futile to claim that the EU is characterised by a functional separation of powers, since none of the institutions monopolises a single function.<sup>45</sup> On the other hand, this does not mean that the functional features of the legislative, executive and juridical forms of communication cannot be identified in relation to the EU. But the functional features are not attached to specific institutions, and it is exactly this lack of attachment of different forms of communication to corresponding organisational structures which makes the existing order different from the vision embodied in the modern concept of a functional separation of powers.

As pointed out by Majone,<sup>46</sup> the EU’s governing dimension rather resembles an early modern mixed constitution since the main political-administrative institutions *jointly* share decisional and executive powers.<sup>47</sup> Moreover, the principle of institutional autonomy, which resembles the autonomy of the “estates” in the early-modern period, is a fundamental principle of the Union –

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Köster, Case. No. C-25/70 [1970] ECR 1161, Nr. 6.

43 E.g. Georg Haibach: ‘Separation and Delegation of Legislative Powers: A Comparative Analysis’, pp. 53-66 in M. Andenas/A. Türk (Eds.): *Delegated Legislation and the Role of Committees in the EC* (The Hague, Kluwer, 2000); Koen Lenaerts/Amayrillis Verhoeven: ‘Institutional Balance as a Guarantee for Democracy in EU Governance’, pp. 35-88 in C. Joerges/R. Dehousse (Eds.) *Good Governance in Europe’s Integrated Market*, (Oxford, Oxford University Press, 2002).

44 Koen Lenaerts: ‘Some Reflections on the Separation of Powers in the European Community’, *Common Market Law Review*, pp. 11-35, 28, 1990, p. 13.

45 That the Community is not based on a concept of functional separation of powers has also been recognized by the ECJ. See Joined Cases 188 to 190/80, France, Italy and United Kingdom vs. Commission [1982], ECR 2545, 2573. See also Georg Haibach: ‘Comitology after Amsterdam: A Comparative Analysis of the Delegation of Legislative Powers’. *EIPASCOPE*, pp. 1-7, 3, 1997, p. 1.

46 Giandomenico Majone: ‘Delegation of Regulatory Powers in a Mixed Polity’, *European Law Journal*, pp. 319-39, 8, 3, 2002.

47 For an overview over the concept of a mixed constitution see Alois Riklin: *Machtteilung – Geschichte der Mischverfassung* (Darmstadt, Wissenschaftliche Buchgesellschaft, 2005).

just as the principle of loyal cooperation was an important feature of early-modern mixed polities as well as of the EU today.<sup>48</sup>

The understanding of the EU as largely characterised by an “early-modern” form of power-sharing, where the Commission, the Council and the EP respectively seem to fulfil the role of the King, the Lords and the Commons, helps explain the integrationist bias of EU policies. This results from the fact that power sharing gives the EU an organic character which is oriented towards establishing unity through the suppression of centrifugal tendencies.<sup>49</sup> In principle, the IB ensures that all stakeholders have a say in the decision-making processes. Hence, the quest for increased integration is not just a regulatory principle guiding the EU’s policy programmes: integration is rather a meta-norm through which the internal unity of the EU is established, given that the logic of integration is the mechanism through which cohesion between the legal, political and administrative dimensions of the EU structure is created and continuously reaffirmed.

The price paid for such unity is substantial however, as power sharing implies that several institutional actors possess the ability to block decision-making. Not surprisingly, this has led to the development of a complex system of pay-offs, which have been introduced in order to get priorities approved. For example, the common agricultural policy was developed as a pay-off to France to guarantee it would accept liberalisation of the market for industrial goods as advocated by Germany.<sup>50</sup> The introduction of the SEA was, moreover, conditioned by the increased introduction of regional and social funds, which served as a system of pay-offs to economically less advanced countries such as Greece, Ireland, Portugal and Spain in the 1980s and 1990s and the Central and Eastern European countries today. This also explains why the EU has never confined its role to that of a “regulatory state”, as advocated by Majone.<sup>51</sup> The reason being that the EU’s institutional setting creates a structural

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48 Giandomenico Majone: ‘Delegation of Regulatory Powers in a Mixed Polity’, *European Law Journal*, pp. 319-39, 8, 3, 2002.

49 The organic character of the Community was also acknowledged by the former president of the Commission Jacques Santer: “L’efficacité de la méthode communautaire, ... repose sur la bonne coopération, sur une complémentarité organique, entre les institutions” see Jacques Santer: *L’avenir de l’Europe.. Quel rôle pour la Commission? Eloge de la méthode communautaire*, European University Institute, Jean Monnet Lecture, 20 Oct. 1995. Also quoted in Georg Haibach: ‘The History of Comitology’, pp. 185-215 in M. Andenas/A. Türk (Eds.): *Delegated Legislation and the Role of Committees in the EC* (The Hague, Kluwer, 2000), p. 215.

50 Andrew Moravcsik: *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, Cornell University Press, 1998), pp. 159.

51 Giandomenico Majone: *Regulating Europe* (London, Routledge, 1996). For a critique

frame within which the exercise of regulatory functions is conditioned by the ability, using re-distributive policies, to “bribe” institutional actors who are able to block decision-making, and who will most likely, witness a sub-optimal outcome from common regulatory approaches.<sup>52</sup> In terms of policy outcome, strong reliance on mixed government features, which are merely oriented towards the establishment of negative limitations on the exercise of power, also explains the strong orientation towards “conservation” which characterises policies such as the common agricultural and the common fisheries policy. Not only have these policies proved inherently difficult to reform, but they also seem to be defended by the Commission for the sole reason that they embody the idea of almost complete integration.<sup>53</sup>

In contrast to the above perspective, gradual expansion of the co-decision procedure and the rise of the EP could be interpreted as a tentative move towards the establishment of a federal dual system with the Council and the EP as the central players. Such a development can, moreover, be interpreted as a first step towards a clearer functional differentiation of powers.<sup>54</sup> But the rise of the EP, increasingly acting on an equal footing with the Commission and the Council, has also augmented the complexity of the institutional setting and reinforced the character of the EU as a structure where all representative institutions have a say in all decisions. This development is, moreover, strengthened by the rise of the European Council which today shares *de facto* the right to initiate legislation with the Commission. Consequently, the Community Method and especially the co-decision variant, featuring as the central and most mature element of the EU’s legislative structure, might increasingly resemble the constitutional structures of political systems in the nation-state form.

Meanwhile, new institutional forms and procedures, which reinforce the

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of Majone in relation to the issue of regulatory and distributive policies see; Andreas Follesdal/Simon Hix: ‘Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, pp. 533-562 in: *Journal of Common Market Studies* 44, 3, 2005.

52 See also Koen Lenaerts: ‘Some Reflections on the Separation of Powers in the European Community’, *Common Market Law Review*, pp. 11-35, 28, 1990; Xénophon A. Yataganas: ‘The Treaty of Nice. The Sharing Power and Institutional Balance in the European Union – A Continental Perspective’, *Jean Monnet Working Papers*, 1, 2001.

53 These policy areas are probably the only ones where it is possible to apply a concept of “integrated administrations” in the sense of Hofmann and Türk. See Herwig C. H. Hofmann/Alexander Türk: ‘The Development of Integrated Administration in the EU and its Consequences’, *European Law Journal*, pp. 253-271, 13, 2, 2007.

54 E.g. Xénophon A. Yataganas: ‘Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies’, *Jean Monnet Working Paper* 3, 2001. pp. 11.

characteristics of the EU as an integrationist structure based upon shared powers, continue to emerge, through the continued expansion of the integration process. Hence, the EU's institutional development seems to be characterised by a contradictory dual movement whereby the characteristics of power sharing expand continuously while, at the same time, tentative moves towards a clearer functional separation of powers can be observed within the most developed areas of the institutional setting. With these contradictory developments in mind, it is therefore not surprising that the "expanding universe" of the EU seems to be "stumbling along", as its contradictory "early-modern" and "modern" features both seem to be strengthened, thereby creating a setting characterised by constant internal tensions between the two forms.

## 5. Partial Constitutionalism

Since H. Rasmussen broke the taboo and pointed out what everyone already knew concerning the "legal activism" of the ECJ,<sup>55</sup> it has become acceptable to claim in public that the ECJ has been subject to a different kind of rationality than a purely legal one. Rasmussen views this as an unfortunate "politicisation" of the ECJ. Bearing in mind the subordination of the EU political policies to the logic of integration, one might be able to consider legal activism as reflecting a similar situation whereby the legal/legal-law (*Recht/Unrecht*) distinction of the ECJ, acting as an organization within the realm of the legal system, is also subordinated to the integrationist logic. Such subordination does not imply a complete exclusion of legal rationality, but merely indicates that the operations of the ECJ are subject to a "double binary coding". To the extent that social systems, in the form of interaction, organizational or functional systems, are understood as *Sinn* (meaning) producing systems<sup>56</sup>, such limitations can also be understood as a form of "under-differentiation" which produces "over-reductions" of *Sinn*. Not surprisingly, the occurrence of such forms of over-reduction has therefore led to the development of regulatory ideas and normative models concerning the possible transformation of the ECJ, either into a European supreme court<sup>57</sup> or into a court capable of safeguarding

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55 Hjalte Rasmussen: *On Law and Policy in the European Court of Justice* (Dordrecht, Martinus Nijhoff, 1986); Joseph H. H. Weiler: 'The Court of Justice on Trial', *Common Market Law Review*, pp. 555-589, 24, 1987.

56 We are here following Luhmann's Husserl inspired suggestion to understand meaning (*Sinn*) as the basic element of society. See Niklas Luhmann: *Sinn als Grundbegriff der Soziologie*. Pp. 25-100 in: J. Habermas/ N. Luhmann (Eds.): *Theorie der Gesellschaft oder Sozialtechnologie?* (Suhrkamp Verlag, 1971).

57 E.g. Ingolf Pernice: 'Maastricht, Staat und Demokratie', *Die Verwaltung*, pp. 449-488,

its autonomy through increased self-restraint.<sup>58</sup>

However, the EU has also undergone a rapid constitutionalization process over the last decades.<sup>59</sup> This process contradicts the logic of integration. As already indicated, a central function of constitutions is to enable the legal system to observe the system-internal processes of the political system while the system-internal processes of the legal system are simultaneously observed by the political system.<sup>60</sup> Processes of constitutionalization therefore tend to occur within the context of increased differentiation between law and politics, arising from increased social complexity.<sup>61</sup> Accordingly, the ongoing constitutionalization process can be understood as reflecting an increased dissolution of the integration overlay. The tendencies towards dissolution should, however, not necessarily be understood as indicating a failure for the EU since the EU in praxis remain committed to the regulatory principle of establishing “an ever closer union” through increased integration, which again implies eventual transformation into some sort of state. In this sense, the regulatory principle of statehood through integration implies “self-dissolution” in that the move towards modern statehood implies that the organic unity established through the institutional balance will be replaced with the kind of metaphorical unity that characterizes modern states.<sup>62</sup> The constitutionalization of the EU is, however, not only characterized by an increased horizontal dissolution of the EU’s unity, but also by vertical hierarchisation. The differentiation of increasingly independent dimensions of law and politics is conditioned by a move towards a merger of the EU dimensions of law and politics with their respective counterparts at the nation-state level. Thus, the EU dimensions increasingly form hierarchical peaks in new European-wide subsystems of law and politics, as con-

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26, 1993; R. Dehousse: *The European Court of Justice* (London, Macmillan Press, 1998), pp. 148.

58 E.g. Hjalte Rasmussen: *Towards a Normative Theory of Interpretation of Community Law* (Copenhagen, Political Studies Press, 1993).

59 The narrative of the constitutionalisation process has been written several times. Most notably: Christian Joerges: ‘Das Recht im Prozeß des Konstitutionalisierung Europas’, *EUI Working Papers*, 6, 2001; Joseph H. H. Weiler: ‘The Transformation of Europe’, *Yale Law Journal*, pp. 2402-2483, 100, 1991; Eric Stein: ‘Lawyers, Judges, and the Making of a Transnational Constitution’, *American Journal of International Law*, pp. 1-27, 75, 1981.

60 Niklas Luhmann: *Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag), pp. 390 ff.

61 Niklas Luhmann: ‘Verfassung als evolutionäre Errungenschaft’, *Rechtshistorisches Journal*, pp. 176-220, 9, 1990.

62 Jens Bartelson: *The Critique of the State* (Cambridge, Cambridge University Press, 2001).

cretized through the legal doctrines concerning “direct effect”<sup>63</sup>, “superiority of Community law”<sup>64</sup> and “pre-emption”<sup>65</sup>. The move towards hierarchisation therefore increasingly blurs the distinction between the EU and the MS legal orders.

On the other hand, the crucial question of *Kompetenz-Kompetenz*, the question of who has the competence to decide where the border between EU and MS competences lies, remains unresolved because the ECJ claim this role for itself without such claim being acknowledged by all constitutional courts of the MS. In addition, the interrelated political question of the fundamental nature of the embryonic polity remains largely unresolved. As indicated by the failure of the constitutional treaty, there are clear limitations to how constitutional the EU can be.<sup>66</sup> Consequently, the EU seems to be oscillating somewhere between being a separate legal order and engaging in a merger with the national legal orders. The resistance of the MS, seems, in other words, to transform the quest for “complete” statehood into an unattainable mirage even though a certain level of constitutionalization has been achieved. Instead the EU has entered into a state of “permanent dissolution”, in the sense that it continues to operate on the basis of the regulatory idea of state-building through the dissolution of the unity established by the integration overlay, whilst confronting structural conditions which make the idea unachievable. The relationship between the EU legal order and the MS legal orders therefore remains fundamentally unresolved.<sup>67</sup>

## 6. Horizontal Constitutionalism I

One of the most original attempts to re-conceptualize the relationship between the EU and the MS legal orders is illustrated by the conflict of laws approach. This approach departs from a paradox in that conflict of laws methodology is oriented towards ensuring unity whilst maintaining substantial diversity. Thus, it is an approach which is particularly well suited to tackle the fundamentally

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63 Case 26/62 *Van gend en Loos v Nederlandse Administratie der Belastingen* ECR I. 1963.

64 Case 6/64 *Costa v ENEL*. ECR 585. 1964.

65 ERTA Case 22/70 *Commission v Council*. ECR 273. 1971.

66 Miguel P. Maduro: ‘How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union’, *Jean Monnet Working Paper*, 1-55, 5, 2004.

67 Joseph H. H. Weiler: *The Constitution of Europe. “Do the New Clothes Have an Emperor?” And other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), pp. 286.



unresolved character of the interaction between the different legal orders characterizing the European context in the sense that it is an approach which takes the EU's "slogan" concerning "unity in diversity" seriously.

As argued by C. Joerges, the EU courts have intentionally developed "meta-norms", with the objective of achieving stabilization of conflicts between the different legal orders without breaking down or replacing any of the involved orders. This understanding of EU law is based on a functionalist perspective. Conflicts emerge between MS because of an increasingly higher level of interdependence between them, thereby creating the functional need for conflict resolution. The key argument promoted by Joerges is however normative; increased interdependence means that the MS are increasingly characterized by a democratic deficit since the democratic decisions of the MS are generating extra-territorial effects with greater frequency. These effects are not reflected in the democratic decisions of those states, since their only point of reference is their own constituency and not those of their neighbors. EC law (and EU integration as such) should therefore be understood as compensatory measures which ensure that the extra-territorial effects of MS actions are taken into account. The European constitutionalization process should consequently be understood as complementary to nation-state constitutionalism, as its objective is to ensure a reduction in negative externalities arising from the operations of national political systems.<sup>68</sup>

According to Joerges, the development of European "meta-norms" has provided a legal framework within which regulatory structures such as the "new approach" through mutual recognition of technical standards and the delegation of standardization activities to private actors,<sup>69</sup> as well as the emergence and expansion of Comitology and agencies have been made possible. It is therefore possible to observe a relationship of mutual increase between the

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68 Christian Joerges: ' "Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making', *Journal of Common Market Studies*, 44, 2006, pp. 779-802, p. 790; Christian Joerges/Florian Rödl: Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtssprechung im Umgang mit dem "sozialen Defizit" des Integrationsprojekts. Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*, ZERP-Diskussionspapier 2, 2008, p. 8.

69 The "new approach" was introduced in 1985 as a way of getting of the deadlock which the ambition of realizing the internal market through technical harmonization found itself in at that time. The solution introduced was to limit EC legislation to the definition of "essential requirements" and then leave it up to societal actors within private standardization bodies to define the details. See also Harm Schepel: *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets* (Hart, Oxford, 2005).

European constitutionalization process and the emergence of GS. In addition, the incremental build-up of a European legal framework has also served as a frame for the continued expansion of the political dimension of the EU. Hence, it is possible to consider the EU as characterized by a symbiotic relationship between three dimensions: firstly, the “semi-hierarchical” legal order; secondly, the political dimension as embodied in the triangular relationship between Council, Commission and Parliament, and thirdly, a hybrid administrative infrastructure as provided for by the GS.<sup>70</sup>

Joerges’ version of the conflict of laws approach encapsulates the emergence and purpose of the European project within a highly elegant construction. Moreover, its central strength lies in the fact that it does not deduct a normative vision for Europe from a purely analytical ideal model concerning how Europe ought to be. Instead it departs from an inductive functional perspective, the main focus of which is the pragmatic solution of common problems. It provides a normative justification for the processes of conflict resolution which evolves in Europe on a day-to-day basis. The conflict of laws approach is in touch with reality.

Two problems emerge however: firstly, the conflict of laws approach does not provide an answer to the question of how the instrumentalization of EU law as a vehicle of integration can be curbed. The increased interdependence, the functional problem from which the conflict of laws approach departs, is to a large extent created through EU integration and the pro-integrationist legal activism of the Courts. Hence, the European legal system has itself played a pivotal role by paving the way for increased interdependence which – according to Joerges - provides the normative justification for the development of meta-norms by the European Courts. From this perspective, Joerges’ conflict of laws approach therefore merely provides a language with which the producers of EU law can engage in a self-justifying exercise of their own achievements.

Hence, if the normative purpose of Joerges’ conflict of laws approach is deemed viable, it needs to be complemented by a focus on constitutional safe-

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70 Christian Joerges: ‘Rethinking European Law’s Supremacy: A Plea for a Supranational Conflict of Laws’, EUI Working Papers (Law), 12, 2005; Christian Joerges: Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO, pp. 491-527 in C. Joerges/E.U. Petersmann (Eds.): Constitutionalism, Multilevel Trade Governance and Social Regulation (Oxford, Hart Publishing, 2006), pp. 493f.; Christian Joerges: ‘Rethinking European Law’s Supremacy: A Plea for a Supranational Conflict of Laws’, in: B. Kohler Koch/B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Lanham, MD: Rowman & Littlefield, 2007), pp. 311-327.

guards capable of breaking up the integrationist logic and curbing the legal activism of the European courts. A form of legal activism, which Joerges (in collaboration with F. Rödl) himself also has fiercely criticized in relation to the *Viking* and *Laval* judgments.<sup>71</sup> As we will shortly see, the vertical relations between the Commission and the ECJ on the one hand, and the MS on the other hand, therefore deserve greater attention. In addition, the possibility of strengthening the EU's political dimension through a democratization of the EU must be addressed since it is the failure of the EU's political dimension to provide the courts with suitable reference points through legislative acts, which has made the legal activism of the courts possible.

Secondly: as pointed out by D. Chalmers, Joerges' variant of the conflict of laws approach amounts to a re-territorialization of authority.<sup>72</sup> The main concern of Joerges is the ability of the law to curb the territorially based power of the nation states. This is a relevant objective. But as argued by Chalmers, territorially vested authority is no longer the only form of authority. The mutation of the EU into a conglomerate compromising a multitude of governing and governance structures has undercut the claim of territorially based powers as the only source of authority, since the different elements of the EU increasingly, have become independent structures operating in an increasingly autonomous manner. Hence, the different dimensions of the European conglomerate to a large extent, claim authority through recourse to scientific knowledge and other forms of "expertise". The conflict of laws approach promoted by Joerges, does not however sufficiently address this issue,<sup>73</sup> although the need to do so is inherent in his diagnosis of the existence of an unholy alliance between the legal formalism of the ECJ and the deployment of soft law techniques.<sup>74</sup> An alliance which illustrates that soft law techniques tend to be

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71 Christian Joerges/Florian Rödl: Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtssprechung im Umgang mit dem "sozialen Defizit" des Integrationsprojekts. Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*, ZERP-Diskussionspapier 2, 2008.

72 Damian Chalmers: 'Deliberative Supranationalism and the Reterritorialization of Authority', pp. 29-44 in C. Joerges: 'Rethinking European Law's Supremacy', *EUI Working Paper Law*, 12, 2005.

73 This issue is however the central focus point for the earlier work of Joerges on "Deliberative Supranationalism". The focus of this approach is on deliberation within Comitology. Deliberative Supranationalism is however situated on a different level as it does not deal with the overall constitutional structure of the EU.

74 Christian Joerges/Florian Rödl: Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtssprechung im Umgang mit dem "sozialen Defizit" des Integrationsprojekts. Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*, ZERP-Diskussionspapier 2, 2008.

instrumentalised in order to promote increased integration.<sup>75</sup>

A central reason for this is that his approach remains based on a traditional variant of the conflict of laws, which focuses on vertical conflicts between Brussels and the MS and especially on horizontal conflicts between territorially defined state entities in the MS form. But these two forms of conflict differ significantly from those which emerge in a radically functionally differentiated world. As argued by G. Teubner, collisions between functionally differentiated structures are increasingly becoming a defining element globally.<sup>76</sup> Hence, in relation to the EU, operating as a hybrid between global structures and the nation-states, it is – besides vertical conflicts – possible to observe two forms of horizontal conflicts developing at the same time, namely those between states which Joerges focuses upon, and those between the different functionally differentiated spheres of society.<sup>77</sup> Risk regulation, which is a key activity of the EU, serves as a forceful illustration of the latter, insofar as different forms of rationality, arising from different functionally differentiated spheres such as the economy, environment and health tend to collide.<sup>78</sup>

In relation to broader societal conflicts Joerges' approach however remains oriented towards classical forms of welfare state regulation, which, in their internal regulation, rely on a concept of stratificatory differentiation.<sup>79</sup> The emergences of a "another modernity" (Beck), have however reduced stratificatory differentiation from a phenomenon which served a central role in the internal stabilization of almost all spheres of society to a form which mainly is relevant in relation to the internal organization and stabilization of labor market regimes, which themselves are established through a functional delineation vis-à-vis other functionally delineated regimes. In its present form Joerges' approach, thereby only deals with a limited aspect of societal organization just as it is only relevant in relation to the impact of European integration on this specific section of soci-

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75 For an example in relation to Research and Development policy see Poul F. Kjaer: Formalization or De-Formalization through Governance? in: R. Nickel (Ed.): Conflict of Laws or Laws of Conflict. *ARENA Report Series*, Oslo, 2009 forthcoming.

76 Gunther Teubner: De collisione discursuum: Communicative Rationalities in Law, Morality and Politics, pp. 901-918, *Cardozo Law Review*, 17, 1996.

77 That is of course also the case within nation states and at the trans-national level. "Double-horizontality" is however a particular strong feature of the EU.

78 Poul Kjaer: 'Rationality within REACH? On Functional Differentiation as the Structural Foundation of Legitimacy in European Chemicals Regulation', *EUI Working Papers (Law)*, nr. 18, 2007.

79 See especially Christian Joerges/Florian Rödl: Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtssprechung im Umgang mit dem "sozialen Defizit" des Integrationsprojekts. Ein Beitrag aus Anlass der Urteile des EuGH in den Rechtssachen *Viking* und *Laval*, ZERP-Diskussionspapier 2, 2008.

ety. A comprehensive constitutional approach, capable of grasping the defining features of the European integration phenomenon, therefore needs to reach beyond Joerges' horizontal territorial (and indirectly also stratificatory) approach. His theory needs to be expanded into a three-dimensional structure since it should be capable of addressing vertical as well as both forms of horizontal (territorial and functionally differentiated) conflicts.

## **7. Vertical Constitutionalism**

The question of how the instrumentalization of EC law can be curbed leads directly to the question of how the balance between politics and law can be re-configured in the EU context to ensure that the operations of the legal dimension converge with those of the political dimension. Until now the central impetus for increased integration has come from the Heads of State and Governments operating within the realm of the European Council. At the same time – after the Commission has prepared the ground – the Council has played the principal role in the day-to-day making of integrative decisions. It is however exactly this form of policy-making which has proved inadequate when it comes to the development of constitutional principles and legislative acts capable of providing suitable reference points for the European courts. The reliance on power sharing means that it is immensely difficult for the EU to produce coherent legal texts since sharing power between multiple institutions with the ability to block progress means that the outcome of legislative processes typically represents the lowest denominator. Dictated by the need to make political compromises, the result is that insufficient solutions are provided for pressing functional problems. In addition, systemic deficits occur because power sharing tends to produce legislation characterized by a mismatch of contradictory objectives and deliberately vague formulations. In other words, the EU's political dimension systematically produces suboptimal outcomes thereby creating decisional vacuums, forcing the courts to define the actual scope and intentions of community legislation.<sup>80</sup> Hence, it is the deficiency of the EU's political dimension in the production of coherent legislative

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80 A typical example is the recently adopted service directive, which essentially leaves it to the Courts to define the scope of the directive. See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. For an assessment see Susanne K. Schmidt: *Competing in Markets, not Rules: The Conflict over the Single Services Market*, pp. 31-54 in Christian Joerges/Poul F. Kjaer: *Transnational Standards of Social Protection. Contrasting European and International Governance*, ARENA Report, No. 5, 2008, Oslo (available at [www.reconproject.eu](http://www.reconproject.eu)).

texts which has prevented the emergence of an optimal functional synthesis between law and politics. As a result, the ECJ (and the Court of First Instance) are able to engage in legal activism based on their pro-integrationist bias.

The standard solution proposed as a means of overcoming this problem has been increased politicization. In general, increased politicization is equated with increased democratization.<sup>81</sup> The question of how or to what extent the EU can be democratized must however begin with an analysis of the structural conditions which must be in place in order for democratic structures to emerge and function. Democracy can be understood as a particular frame through which the political system observes its environment through reference to a collective in the form of the people. This reference allows the political system to define the section of its environment which it deems relevant in its continual selection of operations. In addition, democracy can be understood as a specific mode of legally regulated collective decision making, characterized by a differentiation of roles between government and opposition, which relies on the existence of a hierarchically organized and legally framed bureaucratic structure capable of implementing such collective decisions through the (potential) invoking of negative sanctions.<sup>82</sup>

As already indicated, the EU only partially shares these characteristics of democracy and hence remains a “quasi-democracy”. The status as a “quasi-democracy” is further reinforced by the absence of a singular form of European people (*Staatsvolk*). A solution has emerged with the concept of “multiple demoï”.<sup>83</sup> Such conceptual “arm-twisting” will however not solve the real problem, namely the limited reach of democracy. Democratic decision-making remains conditioned by the existence of legal as well as organizational hierarchies, since collectively binding decision making is conditioned by the ability to ensure implementation and the possible deployment of negative sanctions. In other words: democracy remains a “parasite” on power<sup>84</sup> because it is conditioned by the existence of an instrument of rule and by a monopoly of power

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81 E.g. Erik O. Eriksen & John Erik Fossum: ‘Europe at a Crossroads: Government or Transnational Governance?’, pp. 115-146 in: C. Joerges/I.-J. Sand/G. Teubner (Eds.): *Transnational Governance and Constitutionalism* (Oxford, Hart Publishing, 2004).

82 Niklas Luhmann: ‘Die Zukunft der Demokratie’, pp. 126-32 in N. Luhmann: *Soziologische Aufklärung, Band 4. Beiträge Zur Funktionalen Differenzierung der Gesellschaft* (Opladen, Westdeutscher Verlag, 1994), pp. 127.

83 Joseph H. H. Weiler: ‘Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision’, *European Law Journal*, pp. 219-258, 1, 1995.

84 Niklas Luhmann: *Die Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 2000), p. 357.

through which democratically made decisions can be channeled.<sup>85</sup> Democracy is therefore intrinsically linked to the existence of strong vertical political and legal control and demand structures on the basis of a distinction between the rulers and the ruled. This structural limitation explains why “radical democracy”, encompassing society as whole, has never been able to manifest itself. Democracy remains a limited concept which is unable to manifest itself beyond the boundaries of the hierarchic order or the political system.

The insight that democracy is impossible beyond the realm of hierarchy has profound implications for the feasibility of the objective of achieving a democratization of the EU, because it remains a structure which is partly based on governing and partly on governance. Since the governance dimension is not hierarchical in nature, it cannot be a subject of democratization. Hence, the governance dimension is not an un-democratic structure which has the potential to become a subject of democratization. Rather it is an a-democratic structure which is beyond the reach of democracy. Hence, calls for a “complete” democratization of the EU through a transfer of the basic features of nation state democracy to the EU cannot be realized since only the governing dimension of the EU can be subject to democratization.

Alternatively, the attempt to grasp ongoing developments within the EU must be based on a dual approach. A pincer movement (*Zangenbewegung*) is required which on the one hand, explores the viability and consequences of increased democratization of the governing dimension, whilst on the other hand, alternative concepts are developed to frame the governance dimension. From a constitutionalization perspective, the key issue is therefore how law can contribute to the double-sided task of facilitating and curbing the exercise of power within the two dimensions whilst maintaining the carefully developed balance between the two dimensions.

Regarding the governing dimension, the central problem involves reliance on the concept of institutional balance. But the real problem here is not “under-democratization” but rather “under-differentiation”. This diagnosis also contains a possible answer to the problem of developing an adequate political “partner” for the legal system. This is because the tentative move towards transforming the institutional balance into a functionally differentiated structure resembling the classical modern differentiation between the legislative, the executive and

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85 Hence, it is no coincidence that, in Europe, democracy first emerged after the creation of the territorial states and that it simply took the form of an exchange of the already existing sovereignty of the prince with the sovereignty of the people. See Norbert Elias: *Über den Prozeß der Zivilisation*, Band 2 (Frankfurt am Main, Suhrkamp Verlag [1938]1976).

the juridical branches advocated by Seyès and Kant, would potentially rationalize the system by granting specific institutions a monopoly on specific functions. This would undermine the kind of blocking-capability which tends to reduce community legislation into a patchwork of contradictory objectives. Simultaneously, functional differentiation would ensure effective limitations on the exercise of power because specific institutions would be confined to the exercise of specific functions thereby making it possible to clearly identify the *Letztverantwortliche* institution. A stronger reliance on functional separation is therefore likely to improve the flexibility of the system and hence increase the EU's ability to react to changes in its environment through the incorporation of new knowledge without relinquishing the "rule of law".

## 8. The Positioning of Governance Structures

For the governance dimension the task is somewhat more complicated. The key issue involves the development of a concept of constitutionalization which ensures the stabilization of GS without damaging the flexibility of these structures, whilst maintaining the balance between the governing and governance dimensions. Hence, it is necessary to develop a concept which binds structures such as the OMC, Comitology and agencies within a coherent legal structure, whilst taking seriously the functional demand for integration. Two issues are therefore at stake; i) the positioning of the three forms of governance in relation to each other and ii) the internal organization of governance structures.

In relation to the first problem, the proponents of the OMC have called for a constitutionalization of the OMC.<sup>86</sup> Viewed from a traditional perspective on constitutionalism, this objective is based on an insoluble contradiction, in that purely political processes which operate outside the realm of law cannot be constitutionalized. From this perspective constitutionalization implies a legal framing of a social structure which facilitates the exercise of power whilst the versatility of the power structures are being reduced on the basis of a reference to a people which confers restricted authoritative power to political structures for a limited period of time. In the case of the EU however, it is the MS who confer power to the Union. In addition, in a strictly legal sense, the OMC does not imply that power is conferred on the EU: one of the most widely acclaimed

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86 Jonathan Zeitlin: 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' *European Governance Papers* (EUROGOV), 4, 2005; Charles Sabel/Jonathan Zeitlin: Learning from Difference: The New Architecture of Experimentalist Governance in the EU, *European Law Journal*, Volume 14, Number 3, May 2008, pp. 271-327.



aims of the OMC is precisely to avoid further increases in the legal competencies of the EU. Instead it is seen as a “pure” political process aimed at achieving results through “experimentation”. Hence, OMC processes are directly aimed at increasing the versatility of EU policy-making by surpassing legal constraints. The OMC therefore implies a break with the bonds between law and politics which have traditionally been celebrated as one of the most fundamental achievements of modernity and which were directly aimed at ensuring a balance between versatility and stability. As the OMC represents an attempt to remove the law’s “irritation” of the policy-making process, it is not surprising that its emergence has been greeted, mainly by the political scientists, as a welcome innovation. Nor is it surprising that legal scholars have been much more reserved.

Despite the unease of lawyers, the OMC will not go away. The OMC fulfils a specific “pre-integrative” function within the realm of the European integration process. Moreover and as already indicated, this function is not new.<sup>87</sup> Instead the OMC merely professionalizes and formalizes the kind of pre-integrative mutual observation between MS which has existed ever since the Community was established.<sup>88</sup> From a functional perspective, the OMC is therefore neither a vehicle of deliberation nor merely an intrusive instrument. Such unhelpful dichotomies can be circumvented, by focusing on the usefulness of the OMC, as long as it remains strictly a preliminary tool, applied within policy areas where legal integration, conferring legal competencies to the EU, has not taken place. Policy areas that operate on the basis of relatively unrestrained forms of political rationality because relevant juridical frames have not yet been established.

A constructive approach to the OMC would therefore be to regard it as a necessary first encounter in the integration process within a given policy area. Rather than calling for its abolition, a positive first step would therefore be to negatively delineate its areas of deployment through legal means, thus ensuring that “colonization” of more developed policy areas is avoided. A constitutional containment of the non-legal character of the OMC would establish firewalls between “pre-integrationist”, and therefore “pre-legal”, and inherently political operations and policy areas where power politics has already been successfully restrained via legal instruments. Such restraints could be

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87 Poul F. Kjaer: Formalization or De-Formalization through Governance? in: R. Nickel (Ed.): Conflict of Laws or Laws of Conflict. *ARENA Report Series*, Oslo, 2009 forthcoming.

88 And in fact ever since a system of European states emerged in the 17th century. See Norbert Elias: *Die höfische Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, [1969] 2002).

achieved if the treaty basis of the EU limited the deployment of OMC processes to policy areas where the Union possesses complementary (or supportive), as opposed to shared or exclusive competencies. This would not only serve as a safeguard against colonizing tendencies but would also ensure that the current tendency towards the application of OMC processes in policy areas where the EU does not have any competencies at all is avoided. Such a safeguard would therefore increase the probability that any expansion of the OMC is based on a conscious political decision to grant the EU the possibility of initiating such processes.

A safeguard of this kind would of course merely amount to a negative limitation of the OMC and not to a substantial juridification of the method. However, since the kind of power produced within the OMC processes is inherently difficult to curb through the deployment of legal instruments because of its fluid and non-institutionalized nature,<sup>89</sup> the resulting kind of power is therefore difficult to frame through constitutional measures because constitutional language remains tied to an “old-European” institutionalist perspective. As a consequence, moves towards constitutionalization remain dependent on the existence of formalized institutions. A negative constitutional limitation would however limit the damage which the OMC already inflicts on fundamental elements of the European legal order such as the principle of IB. A principle, which, absent alternatives, remain a pivotal measure for the protection of the rule of law in the EU context. More generally, such a safeguard would moreover ensure that the balance between law and politics and thus the balance between contingency and stability in the EU is maintained.

The concept of the regulatory state contrasts with that of the OMC across virtually all dimensions. As Majone convincingly argues, for structural reasons, there are specific societal functions which are not suitable for politization (e.g. central banking, competition policy and some forms of risk regulation). Indeed, independent regulatory institutions with discretionary power are today a common feature of most, if not all, developed democracies. Given that such functions have already been transferred to the EU system, a case can therefore be made for the establishment of truly independent regulatory agencies within narrowly defined policy areas.

As already noted, many agencies have already been established. However, the majority are not concerned with regulatory issues as such but instead with, for example, monitoring and dissemination. Currently, there are few indica-

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89 Poul F. Kjaer: *Three Forms of Governance and Three Forms of Power*, pp. 23-43 in: E. O. Eriksen/C. Joerges/F. Rödl (Eds.): *Law, Democracy and Solidarity in a Post-national Union* (Routledge, Oxford, 2008), pp. 31.

tions that any of these agencies will develop into regulatory agencies with fully-fledged discretionary competencies in the foreseeable future. Indeed, a central reason for the failure of Majone's policy proposal concerning the establishment of fully fledged regulatory agencies, is that the Community itself only possesses exclusive competencies in few and very narrowly defined policy areas. Hence, the range of policy areas where delegation of exclusive competencies from the Community to agencies is possible remains very limited. Yet, as the unexpected emergence and evolution of Comitology and OMC illustrates, the future remains unknown. One possible way of avoiding the emergence of European agencies with full discretionary powers – where this lacks functional justification – is therefore to introduce a constitutional safeguard stressing that a complete transfer of discretionary competencies to regulatory agencies can only occur within policy areas under exclusive Community competence. Any move towards the establishment of full-blown regulatory agencies would therefore be conditioned by the prior consent of all MS, as well as the EP, to grant the Community exclusive powers in the relevant policy area.

In between the OMC and the concept of the regulatory state, Comitology retains vibrancy. Comitology is strongest in areas of specific and complex regulation, where detailed harmonization is needed. But even if Comitology is an adequate frame for producing harmonization, its uncontrolled spread across policy areas since the 1960s embodies integration by stealth. To counter this development, a constitutional safeguard could be introduced limiting the deployment of Comitology structures to policy areas falling under the CM and which are characterized by shared competencies. Such a limitation would moreover reflect the nature of Comitology as a partly MS and partly Commission dominated realm.

The move towards a clear division of competences between the three modes of governance could moreover be complemented by the adoption of a suggestion tabled several times by the Czech Republic during the two last rounds of treaty negotiations. The Czech Republic suggested that the ability of the European Council, acting under unanimity, to transfer policy areas from the category of supportive competencies to the category of shared or exclusive competencies or shared competencies to the category of exclusive competencies without a treaty amendment should be a two-way street. This mechanism has however been developed as a one-way street in the CT (as well as in the Lisbon Reform Treaty); while it is possible for the Union to increase its competencies, devolution from the Union to the MS remains blocked. The functional need for integration however remains a contingent phenomenon insofar as it reflects the general level of societal interdependence, which in turn is dependent on, for example, economic and technological developments. The need for European meta-norms, as well as the density of such norms, therefore changes

over time because the nature of the specific policy areas is constantly changing. This creates functional needs for the adaptation of policies and the institutional structures which policy-making relies on through evolution or devolution of competencies. The ongoing evolution of the EU's institutional and legal structures does not however reflect the perception that a Union characterized by adaptability rather than uniformity would be a far more viable construction. Instead of pursuing a constitutionalization of the already existing permanently changing constitution (*Wandelverfassung*), the EU remains committed to the continual reinforcement of the integrationist strait-jacket on the basis of the concept of an "ever closer Union".

## 9. Horizontal Constitutionalism II

As regards the internal organization, it is important to keep the societal function of GS in mind. GS are structural couplings which serve as the means through which the EU ensures its embeddedness in society. Whereas the EU's governing dimension can be understood in the narrow sense as an (embryonic) state because it consists of a political and a legal system coupled within a constitutional framework, a broad perspective including both the governing and governance dimensions requires an understanding of the EU as a social conglomerate. This is necessary because the governance dimension, in contrast to the governing dimension, horizontally binds together a multiplicity of functional systems and hence a multiplicity of forms of rationality. Different forms of rationality, such as economic, scientific and ecological, are of course also present within the vertical governing dimension. Within the governing dimension they however remain subordinate to and framed by legal, political and bureaucratic forms of rationality. In contrast, the governance dimension is to a greater extent, characterized by horizontal (*nebengeordnete*) forms of coordination of different kinds of rationality. Hence, GS must be understood as regimes characterized by multi-rationality which act as interfaces between different functional systems.<sup>90</sup> This is also expressed in the partial dissolution of the public/private distinction within the governance dimension. Governance extends beyond public structures to include elements reproduced within, for example, the economic system, the scientific system, as well as ecological

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90 The focus on multi-rationality means that this concept of regimes differs from the one presented by Andreas Fischer-Lescano and Gunther Teubner. See; Andreas Fischer-Lescano/Gunther Teubner: 'Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit', pp. 37-61 in: M. Albert & R. Stichweh (Hrsg): *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung* (Wiesbaden, Vs Verlag, 2007).

forms of communication. This is because the EU's political and bureaucratic structures are dependent on the kind of knowledge which can be derived from other systems and because the EU itself is faced with a need to stabilize its relations with its environment. But GS are more than merely supportive measures for the governing dimension since they embody a systematic attempt which not only aims to directly stabilize relations between the non-legal and non-political spheres of society, but also to achieve the kind of co-ordination (*Abstimmung*) between functionally differentiated spheres such as economy, health and ecology, which is the primary societal contribution (*Leistung*) of politics in a radicalized modernity.<sup>91</sup>

When compared with the period of classical modernity, GS can in other words, be understood as functional equivalents to corporatist structures. Whereas the diminishing phenomenon of corporatism relied on the distinction between employers and employees and hence indirectly on the stratified class structure of the industrial society, the emergence of GS are, on the other hand, a consequence of the move away from stratificatory and segmentary forms of differentiation towards the ever increasing relevance of functional differentiation. With the functional equivalence of corporatism and governance in mind, it is not surprising that the demands for a democratization of European GS resembles the calls for a democratization of the corporatist system through *Verbandsdemokratie* which emerged during the period of classical modernity.<sup>92</sup> Such an objective was only possible however, because corporatist organizations are hierarchically ordered entities. They are “mini-states”, which have adopted the basic features of the hierarchical model of organization characterizing state bureaucracies.<sup>93</sup> In addition, corporatism only brings together two forms of rationality – the political and the economic – within the framework of economic constitutions. In contrast, GS are characterized by strong horizontal features and far more complex couplings of an entire range of rationalities, thereby making a transfer of the ideals of corporatist democracy to the context of GS impossible.

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91 For the transformation of the substantial function of politics in the radicalized modernity see Poul F. Kjaer: *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-national Constellation*, European University Institute (2008), available at <<http://hdl.handle.net/1814/9067>>, pp. 66.

92 For an analysis of the possibilities see Gunther Teubner: *Organisationsdemokratie und Verbandsverfassung: Rechtsmodelle für politisch relevante Verbände*. *Tübinger Rechtswissenschaftliche Abhandlungen, Band 47*, (Tübingen, Mohr Siebeck, 1978).

93 Poul F. Kjaer: 'Post-Hegelian Networks', in M. Amstutz & G. Teubner (Eds.): *Networks: Legal Issues of Multilateral Cooperation* (Oxford, Hart publishing, 2009 forthcoming).

As GS must be understood as highly dynamic autonomous structures, a “state-centered” perspective which only focuses on the governing dimension remains inadequate. Hence, achievement of a classic separation of functions within the governance dimension is not sufficient. Instead of the limited focus on the intersection between legal and political rationalities within the traditional doctrine of a separation of powers, it is necessary to develop a special variant. This would be directly oriented towards the separation of functions within the broader range of horizontal societal settings that are characterized by a multiplicity of forms of rationality. The principle of functional separation could, in other words, be transformed into a constitutional principle which should be applied to regulatory structures as such. Hence, not only the governing dimension, but also horizontal intermediate structures operating in between the public and the private spheres, should be subject to the constitutional principle of functional separation. A move in this direction has already been made in the area of risk regulation through the introduction of the distinction between risk assessment, risk evaluation and risk management. However, a far more incisive move towards institutional separation, reflecting the reproduction of different forms of rationality within the functionally differentiated spheres of society, is required. Several of the existing GS already follows this logic. E.g. REACH, the EU system for the evaluation and authorization of chemicals operates with simultaneous but separate evaluation processes within the committee representing the environmental and health perspectives and the committee for socio-economic analysis. Within the REACH regime functional separation is moreover combined with a central complexity-reducing mechanism that provides a solution to the problem of political overload, insofar as it reduces the problems which are of political relevance to those where real conflicts between functionally different spheres occur and moves the dossiers where convergence between societal actors has been achieved to the background, thereby allowing the political system to deal only with cases of major importance.<sup>94</sup>

The OMC process on Research and Development (R&D) serves to illustrate what contribution functional separation can make. The OMC on R&D is characterized by a bias in rationality since the process is framed by economic rather than scientific rationality. It is precisely to avoid such asymmetries that functional separation is needed. Hence, extending the earlier call for a purely negative delimitation of the OMC through law, one might consider whether functional separation allowing for the separate but simultaneous processing of

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94 Poul Kjaer: ‘Rationality within REACH? On Functional Differentiation as the Structural Foundation of Legitimacy in European Chemicals Regulation’, *EUI Working Papers (Law)*, nr. 18, 2007.

different rationalities can be introduced within the OMC. In the specific example of the OMC within R&D, a “duplication” of the processes could be introduced, as benchmarking and other evaluation exercises could be carried out by two separate structures. Respectively, these structures would provide evaluations from a socio-economic and a scientific perspective, whilst remaining linked within a procedural framework which ensures coherency. Ideally this would provide a basis for informed political decision-making as it would allow the political system to make decisions reflecting economic as well as scientific perspectives, thereby enabling it to fulfill the function of ensuring a balance between rationalities. From this perspective, the merger of the three council configurations for internal market, industry and research into a single competitiveness configuration which was undertaken to facilitate the OMC process in R&D was a move in the wrong direction. Indeed, the merger that took place clearly illustrates the de-differentiation consequences of the OMC in its present form and the dangers that lie in de-formalized forms of governance as well as the value of a formal legal framing of such processes.<sup>95</sup>

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95 For a more detailed account of the operation of the OMC in R & D see Poul F. Kjaer: Formalization or De-Formalization through Governance? in: R. Nickel (Ed.): *Conflict of Laws or Laws of Conflict*. ARENA Report Series, Oslo, 2009 forthcoming.

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